

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN F. KANE, on behalf of himself	:	CIVIL ACTION
and all others similarly situated,	:	
ANNE M. BRADLEY, on behalf of herself	:	
and all others similarly situated, and	:	
LEONARD M. CHEST, on behalf of himself	:	
and all others similarly situated	:	
	:	
v.	:	
	:	
UNITED INDEPENDENT UNION WELFARE FUND,	:	
JULIA M. BRUNO, FRANCIS J. CHIPPARDI,	:	
and MARTIN LIPOFF	:	No. 97-1505

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

July , 1997

This action was brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), § 1132 et seq. The Defendants, United Independent Union Welfare Fund ("the Fund"), Julia M. Bruno ("Bruno"), Francis J. Chippardi ("Chippardi") and Martin Lipoff ("Lipoff") now move to dismiss counts VI, VII, VIII, and IX ("the contested counts") pursuant to Federal Rule Civil Procedure 12(b)(6).¹

Plaintiffs are three former participants in the Fund. They filed this action individually and on behalf of a class. Defendants Bruno, Chippardi, and Lipoff (collectively, "the

1. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint also included dismissal of Counts I, II and III against the Fund and Count V. These dismissals were granted by Order dated July 7, 1997.

trustees") are fiduciaries of the Fund. Bruno is also the administrator of the Fund.

Plaintiffs allege the defendants failed to comply with ERISA and COBRA provisions. Count I alleges the Fund and Bruno failed to provide Kane with requested summary plan documents in violation of 29 U.S.C. § 1024(b)(4). Count II alleges the Fund and Bruno failed to give the plaintiffs the "in-the-door" notice required by 29 U.S.C. § 1166(a)(1). Count III alleges the Fund and Bruno failed to give the appropriate "out-the-door" notice required by 29 U.S.C. § 1166(4). Count IV alleges the Fund failed to give Kane, and others like him, the opportunity to self-pay as required by 29 U.S.C. § 1132(a). Count V alleges Kane, Bradley and Chest were denied summary plan documents after they were requested in violation of 29 U.S.C. § 1024(b)(1). The contested counts allege fiduciary breaches by the trustees in violation of 29 U.S.C. § 1104: Count VI for failure to furnish summary plan documents; Count VII for violation of COBRA provisions; Count VIII for failure to ensure the fund was established by a written instrument and discriminatory enforcement; and, Count IX for failure to specify basis for payments in plan documents. Count X alleges prohibited transactions causing funds to be illegally disbursed to "parties in interest" under 29 U.S.C. § 1106(a). It is also alleged the trustees used the plan in their own interest or for their own account in violation of 29 U.S.C. § 1106(b). Count XI alleges co-fiduciary breaches since each trustee knew about the actions

of the other and did not fulfill duties defined by 29 U.S.C. § 1105.

I. STANDARD FOR A MOTION TO DISMISS

A complaint is properly dismissed under Rule 12(b)(6) if it appears certain that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. Bieros v. Nicola, et al., 860 F. Supp. 226, 229 (E.D. Pa. 1994). The court must accept as true all of the matters pleaded and all reasonable inferences that be can be drawn. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). The plaintiffs' averments must be construed in the light most favorable to them. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989).

II. DISCUSSION

A. Recovery Under Section 1132(a)(2)

"A civil action may be brought . . . by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title" 29 U.S.C. § 1132(a)(2). Section 1109(a) states:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable and remedial relief as the court may deem appropriate, including removal of such fiduciary.

The harm must be to the plan, not to an individual, for recovery under this section.² "Congress did not intend [section 1109] to authorize any relief except for the plan itself." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985); see also Parker v. BankAmerica Corp., 50 F.3d 757, 768 (9th Cir. 1995) (individuals can bring a fiduciary claim against an ERISA administrator, but only for the benefit of the plan).

The alleged breach must be proved to have caused actual injury to the plan. See In re Unisys Corp. Retiree Medical Benefit ("ERISA") Litigation 74 F.3d 420, 441 (3d Cir. 1996) (motion to dismiss denied where employees were actively misinformed by affirmative representations that medical benefits were guaranteed to a large number of employees when they were not). See also, Kuper, et al. v. Iovenko, at al., 66 F.3d 1447, 1459 (6th Cir. 1995)(a fiduciary's failure to investigate an investment decision is not sufficient causal link to the harm suffered by the plan); Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 279 (2d Cir. 1992; Willett v. Blue Cross and Blue Shield of Ala., 953 F.2d 1335, 1343 (11th Cir. 1992).

2. The court cannot award damages for medical bills incurred by individual plaintiffs, Count VII Prayer for relief, ¶ f, under section 1132(a)(2). The relief sought must be for the benefit of the plan. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 143-44.

In Plaintiffs' Response, they withdrew these claims since they are clearly inappropriate. See p.10 n.7. Since these contested counts, under section 1132(a)(2), will be dismissed completely, this withdrawal is moot.

An action taken by an administrator against an individual may not be sufficient to show causation for alleged injury to the plan by a fiduciary. See Ream v. Frey, et al., 107 F.3d 147, 153 (3d Cir. 1997) (a fiduciary is most often characterized as an administrator with little interaction or effect upon individual claims).

The contested counts all allege fiduciary breaches for actions against the individual plaintiffs, including failure to provide required documents, give proper notice under COBRA, maintain the plan by a written instrument, and specify a basis for payments in plan documents. Plaintiffs' amended complaint alleges no present injury to the Fund. Instead, Plaintiffs state, "[i]n Counts VI through IX, Plaintiffs do not now aver that the Fund has suffered monetary losses due to breaches of fiduciary responsibility." Plaintiffs' Response, p. 9 n.6 (emphasis in original).

Plaintiffs argued that the Fund may be harmed in the future because of these fiduciary breaches by the trustees. If individuals learn they were not informed of their rights to obtain medical coverage under COBRA, and failed to obtain medical insurance as a result, the plaintiffs claim the Fund may be at risk to pay medical expenses directly. The Fund might also be subjected to statutory penalties.

These harms are too speculative. Plaintiffs cannot establish the necessary direct causal relationship between the fiduciary's actions and harm to the Fund. This action is for the

benefit of individuals, rather than the Fund, and it is premised on the risk of future litigation, that this action may well encourage. These plaintiffs are creating the injury to the plan that they purport to fear. A § 1132(a)(2) action must be for the benefit of the Fund itself not the individual beneficiaries of the Fund.

In addition, the Court seriously doubts whether these individual plaintiffs have the standing to protect current Fund members' interests. Although one or more of the lead plaintiffs may be a current beneficiary of the Fund, the Amended Complaint appears predicated on rights of three former lead plaintiffs on leaving the Fund. If the plaintiffs are not members of the Fund on leaving employment, they are not beneficiaries with statutory standing to bring an action to benefit the Fund.

This is a purported class action. Under Fed R. Civ. P. 23(a)(4), parties may bring an action on behalf of the class only if "the representative parties will fairly and adequately protect the interests of the class." See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157-58. The interests of each member must be aligned. See Amchem Products, Inc. v. Windsor, ____ S. Ct. ____, 1997 WL 345149 (U.S. June 25, 1997) (plaintiffs who suffered exposure to asbestos but no harm could not be a part of a class of plaintiffs exposed and harmed). There may be intra-class conflicts precluding named parties from meeting the adequacy of representation requirement. See Georgine v. Amchem Products, Inc., 83 F.3d 610, aff'd by Amchem Products, 1997 WL

345149. The adequacy heading also factors in competency and conflicts of class counsel. See Amchem Products, 1997 WL 345149, at *20 n.20.

Even if the plaintiffs join a current member of the Fund as a party-plaintiff, there would be a conflict of interest, because former members would be trying to obtain monetary damages from the Fund, but current members should be trying to protect the Fund's assets.³ Cf. Charal v. Andes, 81 F.R.D. 99 (E.D. Pa. 1977)(it would be nearly impossible to adequately represent named plaintiffs with respect to direct claims against defendants and maintain a derivative suit on behalf of the corporation).

Since the complaint has not alleged actual harm to the Fund by the alleged fiduciary breaches of the trustees, there is no possible recovery under 29 U.S.C. § 1132(a)(2).

B. Recovery Under Section 1132(a)(3)

A claim of inadequate notice, or other breach of COBRA may be remedied by 29 U.S.C. 1132(a)(3) states: "[a] civil action may be brought . . . to obtain other appropriate equitable relief (i)

3. There also may be a conflict of interest among the current lead plaintiffs since each was paid benefits for varying time periods (12, 13 and 18 months). Some plaintiffs may have been overpaid, while others underpaid. If this is true, those overpaid might have to reimburse the Fund, while those underpaid would receive additional funds. It would be extremely difficult to represent both these interests adequately.

In addition, it is questionable whether there are the common questions of law and fact required for class certification. See Fed. R. Civ. P. 23(a)(3). Rule 23(a)(3) inquiry overlaps Rule 23(a)(4) inquiry. See Amchem, 1997 WL 345149, at *11. A class certification hearing is currently scheduled for September 15, 1997.

to redress such violations or (ii) to enforce provisions of this subchapter or the terms of the plan." ERISA is a highly detailed statute, and it was the clear intent of Congress to provide specific remedies. The language of section 1132(a)(3) is merely a "catch-all provision" which addresses harm that are not addressed elsewhere in ERISA. See Varity Corp. v. Howe, 116 S. Ct. 1065, 1078-79 (1996); see also Ream, 107 F.3d at 152. If a remedy for the alleged harm is available by another provision of the ERISA statute, a plaintiff cannot sustain a claim under § 1132(a)(3). Varity, 116 S. Ct. at 1076 (fiduciaries had violated their duties when they did not act in the sole interest of their beneficiaries, and there was no other relief available in ERISA, so the plaintiff's could receive "other equitable relief"); Bixler v. Central Pa. Teamsters, 12 F.3d 1292 (3d Cir. 1993) (wrongful denial of benefits and misrepresentations did not have adequate remedy in ERISA as to the plaintiff and therefore she could seek further recovery under § 1132(a)(3) if it benefitted the plan); see also Jordan v. Federal Express, No. 96-3103, 1997 WL 333823, at *8 (3d Cir. June 19, 1997), (misrepresentation claims against a fiduciary are properly brought pursuant to § 1132(a)(3)).

The plaintiffs specifically repudiate any claim under § 1132(a)(3). See Plaintiffs' Response, p. 5-6 ("[These claims] are not brought pursuant to 29 U.S.C. § 1132(a)(3)." (emphasis in original)). But, they

would not rule out, in the future, seeking the Court's leave to add additional Counts to the Complaint pursuant to Section 1132(a)(3) if, inter alia, it is determined during the course of this litigation that the equitable remedies available under Section 1132(a)(3) would afford them relief that is not available elsewhere.

Plaintiffs' Response, p. 6, n.2. Relief under section 1132(a)(3) would be inappropriate on the present allegations. Each contested count is covered by a separate section in the ERISA statute with specific remedy for the harm alleged. Count VI has a remedy provided for by § 1024(b); Count VII has a remedy provided for by § 1132(c)(1);⁴ Counts VIII and IX, raised under § 1102, have remedies provided for by § 1132(a).

Varsity makes it clear that this court cannot grant any remedy other than that specifically provided. Counts VI, VII, III and IX will be dismissed.

An appropriate order follows.

4. Section 1132(c)(1) remedies breaches of § 1166 defining the administrator's duties. It may not cover the breaches of the fiduciaries other than the administrator, Bruno, but the plaintiffs have an adequate remedy in recovery from Bruno and/or what they may recover under Count XI remedying co-fiduciary breaches under §1105.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN F. KANE, on behalf of himself : CIVIL ACTION

and all others similarly situated, :
ANNE M. BRADLEY, on behalf of herself :
and all others similarly situated, and :
LEONARD M. CHEST, on behalf of himself :
and all others similarly situated :
:
v. :
:
UNITED INDEPENDENT UNION WELFARE FUND, :
JULIA M. BRUNO, FRANCIS J. CHIPPARDI, :
and MARTIN LIPOFF : No. 97-1505

AND NOW, this day of July, 1997, upon consideration of Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint, Plaintiffs' reply thereto, and oral argument heard July 7, 1997, it is **ORDERED** that:

1. Counts VI, VII, VIII and IX of the Plaintiff's First Amended Complaint are **DISMISSED**.

2. This action will proceed on Counts I, II, III against Defendant Bruno, Count IV against defendant Fund, and Counts X and XI against defendants Bruno, Chippardi and Lipoff.

3. a) Plaintiff's shall file a Motion to Certify the Class on or before **August 1, 1997**.

b) Defendant's response is due on or before **August 18, 1997**.

c) Plaintiff's reply is due on or before **September 3, 1997**.

4. A Rule 16 Conference and argument on the Motion to Certify the Class will be held in Courtroom 10A on **September 15, 1997 at 9:00 a.m.**.

J.